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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-291

ALEXANDER D. McNABB,
Petitioner,

versus

ELLIOTT L. RICHARDSON, Secretary
of Health, Education, and Welfare,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Alexander D. McNabb
Pro Se
704 Davis Building
1309 Main Street
Dallas, Texas 75202

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Alexander D. McNabb, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 25, 1971 numbered 71-1494 on the Civil Docket of said Court.

DECISIONS AND OPINIONS BELOW

The unreported opinion and ruling dated January 12, 1970 of the Respondent is shown in Appendix A, page 1a.

The unreported opinion and judgment dated December 30, 1970 of the District Court for the Northern District of Texas at Dallas is shown in Appendix B, page 11a.

The Judgment dated June 25, 1971 of the United States Court of Appeals for the Fifth Circuit was without written opinion and is unreported. It is shown in Appendix C, page 12a. The case was put on the Summary Docket and affirmed the decision of the District Court. A Petition for Rehearing was denied July 16, 1971 without written opinion. A stay of issuance of mandate until and including August 29, 1971 was granted July 30, 1971.

JURISDICTION

1. A review of the judgment of the Court of Appeals for the Fifth Circuit dated and entered June 25, 1971 shown in Appendix C is herein sought.

2. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1).

3. Under 42 U.S.C.A., Section 405 (g), also known as Section 205 (g) of the Social Security Act which provides for appeals to a United States District Court from rulings of the Respondent, and also provides in the next to the last sentence:

> "The Judgment of the Court shall be final except that it shall be subject to review in the same manner as the judgment in other civil actions."

4. Under Rule 19 (b) of the Supreme Court.

5. The construction of the statute known as 42 U.S.C.A. Section 411 (c) is involved in that the meaning of "trade or business" is involved. This statute reads as follows:

> "(c) The term 'trade or business', when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in Section 23 of Title 26, Internal Revenue Code of 1939, except that such term shall not include —",

There follows several exceptions not pertinent to this case. Section 23 of Title 26, Internal Revenue Code of 1939 is the same as Section 162 of the 1954 Revenue Code.

QUESTIONS PRESENTED

Point 1

Whether the question of what constitutes a "trade or business" is one of fact or a mixed question of law and fact. If "trade or business" is a mixed question of law and fact, Petitioner is entitled to a review.

Point 2

Where a person buys numerous real estate notes at a discount and does not offer them for sale, but keeps them to maturity as investments, is such discount in-

terest to be considered earnings from a "trade or business", or are such earnings to be considered as earnings from personal investment and are not earnings from a "trade or business" as was held in Higgins v. Commissioner of Internal Revenue, 312 U.S. 212, 61 S.Ct. 475, 85 L.Ed. 783, 1941, which affirmed Higgins v. Commissioner of Internal Revenue, 2nd Cir. 1940, 111 F.2d 795, 796.

STATUTES INVOLVED

The statutes involved have already been mentioned under the heading JURISDICTION.

STATEMENT OF CASE

The Department of Health, Education and Welfare is herein referred to as HEW, the Social Security Administration as SSA, and the Appeals Council of HEW as the Council.

This case concerns old age benefits due Petitioner under Social Security for 1964 and approximately half of 1965. One of the principal points of difference is whether or not Petitioner's income from discounted notes is a "trade or business", as held by the Council, or if such income is the result of personal investments, as contended by Petitioner.

Petitioner's claim for benefits for the years 1964, 1965 and 1966 was denied by the SSA and the Reconsideration Section of the SSA. An appeal from these decisions was heard by an Examiner May 14, 1969 and a decision

was rendered by him July 11, 1969 which held that Petitioner was not entitled to any benefits for 1964 or 1965, but was entitled to benefits for all of 1966.

A review of the Examiner's decision was granted by the Council. A panel of the Council heard the appeal November 26, 1969. On January 12, 1970 the Council rendered its decision, shown in Appendix A hereto, holding that Petitioner, on account of excess earnings, was not entitled to any benefits for 1964; that in 1965 Petitioner's excess earnings were only $729.00 and not $5,093.46, as found by the Examiner. In effect this allowed Petitioner nearly half of his benefits for 1965. The Council concurred with the Examiner in allowing all benefits for 1966. The adverse part of said decision is based on the Council's conclusion that Petitioner's activity of buying notes at a discount constituted a "trade or business". Petitioner did not sell notes for himself or anybody else but virtually always held his notes to maturity. Neither did he broker notes.

Petitioner appealed to the United States District Court at Dallas, which appeal, after cross motions for a Summary Judgment, was dismissed. The Court of Appeals for the Fifth Circuit affirmed the District Court's decision without written opinion and denied a Petition for Rehearing.

In about 1930 Petitioner invested in about one-half dozen very small real estate notes. These investments increased as the years went by and in 1964, 1965 and 1966, Petitioner owned 133, 106 and 70 real estate notes respectively, virtually all acquired at discounts. It is

earnings from this discount interest which Respondent rules constitutes earnings from a "trade or business", and which Petitioner claims is income from personal investments, and as such is not to be included when calculating his earnings from a "trade or business". The exclusion of such income as earnings from a "trade or business" would have entitled Petitioner to his benefits for all of 1965 and 1966.

The facts pertaining to the activities of Petitioner are not in dispute in any detail. Petitioner's testimony and documentary evidence are uncontroverted and unimpeached and constituted all the evidence of the material facts. There is no question of credibility of witnesses, or weighing conflicting evidence.

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

42 U.S.C.A., Section 405 (g) as amended; also known as 205 (g) of the Social Security Act.

REASONS FOR GRANTING THE WRIT

On Point 1 under QUESTIONS PRESENTED the following is offered.

In addition to some law practice business, Petitioner for over thirty years bought real estate notes in Dallas, earning therefrom ordinary interest and discount interest. In only one instance did he ever sell his notes, which was in about the late 1940s when three or five notes were sold to a savings and loan company. He

never did advertise a note, or notes, for sale, but up until about 1950 he did advertise to buy notes, made no investments for others, and did not manage investments for others. Applicant also had numerous other investments, such as General Motors stock, rental properties, etc. Respondent ruled that buying the discounted notes constituted a "trade or business", which had the effect of excluding Petitioner from Social Security benefits for approximately half of 1965 and all of 1966. The District Court and the Circuit Court affirmed the Respondent's decision on the theory that what constitutes a "trade or business" is solely one of fact and as such is not reviewable.

Local Rule 18 (a) of the Fifth Circuit states,

> "Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar."

The summary action of the Court leads to no other conclusion except that they consider that "trade or business" is a fact question only and is resolved by the ruling of the Respondent.

If "trade or business" is held to be a question of fact only, Petitioner is not entitled to certiorari regardless of the injustice, but if "trade or business" is still a mixed question of fact and law, as so many Courts have held, then Petitioner is entitled to certiorari and a review of Respondent's ruling.

42 U.S.C.A. Section 411 (c), quoted supra, provides that the term "trade or business" means the same thing for determining earnings from self employment under Social Security law as in income tax laws. Therefore, the decisions as to what constitutes a trade or business rendered in connection with income tax laws apply with equal force to this case.

Petitioner contends that what constitutes a "trade or business" is a mixed question of law and fact and is reviewable. Mr. Justice Frankfurter in a concurring opinion in Deputy, etc. v. DuPont, 308 U.S. 488, 60 S. Ct. 363, 369, 84 L.Ed. 416, 1940 stated,

> "What the activities of a taxpayer are is an issue for determination by triers of fact. Whether such activities constitute a 'trade or business' — is open for determination here —"

The Second Circuit in the Higgins case referred to this statement in support of its decision. In addition the following cases from the Appeals Courts for the First to Eighth Circuits inclusive have held "trade or business" to be a mixed question of law and fact and that a determination of that question by an administrative body is reviewable. This particularly applies where there is no contradictory evidence as is the situation in this case.

Foss v. Commissioner of Internal Revenue, 1st Cir. 1935, 75 F. 2d 326;

Commissioner of Internal Revenue v. Smith, 2nd Cir. 1953, 203 F. 2d 310, point 1;

Wilson v. Eisner, 2nd Cir. 1922, 282 F. 38, 42.
Dalton v. Bowers, 2nd Cir. 1932, 56 F. 2d 16;
McDowell v. Ribicoff, Secretary of HEW, 3rd Cir. 1961, 292 F. 2d 174, 178, certiorari denied, 82 S. Ct. 240, 368 U.S. 919, 7 L. Ed. 2d 135;
Cecil v. Commissioner of Internal Revenue, 4th Cir. 1939, 100 F. 2d 896, 900, points 6-8;
Farish v. Commissioner of Internal Revenue, 5th Cir. 1939, 103 F. 2d 63, points 1-3;
United States v. Peabody Co., 6th Cir. 1939, 104 F. 2d 267, 269, point 3;
Marsch v. Commissioner of Internal Revenue, 7th Cir. 1940, 110 F. 2d 423, points 1 and 2;
Washburn v. Commissioner of Internal Revenue, 8th Cir. 1931, 51 F. 2d 949, 951;

The Fifth Circuit now completely reverses its ruling in the Farish case, supra, in which case it stated:

> "In a case presenting only a question of fact we are bound by the findings of evidentiary facts by the Board, if supported by substantial evidence. But where the case presents a mixed question of fact and law, the conclusions of the Board are not controlling, and we are at liberty to substitute our judgment for that of the Board. In this case the evidence was uncontradicted and unimpeached, and the conclusions of the Board involve a construction of the statute. Therefore, the case presents a mixed question of law and fact."

Several cases are cited in support.

The Fifth Circuit has categorically ruled that what constitutes a "trade or business" is a fact question and not reviewable. Mayrath v. Collector, 1966, 357 F. 2d 209; Stanton v. Commissioner of Internal Revenue, 1968, 399 F. 2d 326, 330. They hold that the Supreme Court in the Higgins case, supra, held that "trade or business" is solely a question of fact. The Higgins case makes no such ruling. Obviously, the Fifth Circuit takes the position that the Supreme Court reversed its ruling as stated by Mr. Justice Frankfurter, supra. The Fifth Circuit ruling is in conflict with not only Deputy v. Dupont and its own previous rulings but with the rulings of at least seven other circuit courts.

The Supreme Court in the Higgins case made it clear that they were not surrendering their prerogative nor shirking the responsibility of review on any law question when they stated,

> "The Bureau of Internal Revenue (here HEW) has this duty of determining what is carrying on a business subject to re-examination of the facts by the Board of Tax Appeals and ultimately to review of the law by the courts on which jurisdiction is conferred."

The argument by Respondent in his brief is all directed towards the idea that the substantial evidence supports his decision and it is therefore final. This would be true except that there is a mixed question of law and fact involved.

The Respondent has passed on no fact questions in this case either ultimate or subsidiary. As the evidence was unimpeached and uncontradicted it is just a question of assembling and collating the facts testified to by Petitioner.

It would be error to establish law to the effect that a determination by an administrative body of a mixed question of law and fact is final and cannot be reviewed by the courts. Administrative bodies are usually composed of persons of no legal training. Law questions or mixed questions of law and fact should be for the courts to finally determine. The courts should not shirk this responsibility. The rulings by the Fifth Circuit seek to change this basic idea and law and it should be reversed. This is an important and substantial question to the jurisprudence of the nation because the question of what constitutes a "trade or business" has occurred many times for the courts to pass on in connection with income tax law and will continue to occur in that connection as well as in regard to Social Security claims. This should be definitely settled one way or the other. Where a question is important and recurring, the Supreme Court grants certiorari to resolve it. Glus v. Brooklyn Eastern District Terminal, 1959, 79 S. Ct. 760, 359 U.S. 231, 3 L. Ed. 2d 770.

Any doubts about facts and law should be resolved in Petitioner's favor. In Haberman v. Finch, 2d Cir. 1969, 418 F. 2d 664, 667, the Court cited cases and said,

> "The books are replete with cases holding that the Social Security Act is a remedial statute to be broadly construed and liberally applied,"

The following is offered on Point 2 under QUESTIONS PRESENTED.

The Supreme Court in the Higgins case, supra, held that a person investing his own funds and doing nothing but conserving and enhancing his own estate was not engaged in a "trade or business". A review of the Respondent's decision and of the courts below and the undisputed facts established in the testimony presents a situation exactly parallel to the Higgins case except (1) in the amount of money involved, (2) the type of investments, (3) Petitioner has only one office and Higgins had one in New York and one in Paris, and, (4) in that case the Government was on the receiving end instead of on the paying end as in this case. This presents a conflict with the court below. The Respondent should be required to follow the Higgins case because "trade or business" for income tax purposes means the same thing as "trade or business" for Social Security purposes. 42 U.S.C.A. Section 411 (c), quoted supra.

Petitioner does not want a review just for the sake of a review but after a certiorari is granted it will be time enough to fully discuss in detail the analogy of Petitioner's case with the Higgins case.

To enforce the mandate of Congress that "trade or business" means the same thing for Social Security purposes as in income tax law is a substantial Federal question. Respondent should not be permitted to ignore this law.

Petitioner was making personal investments in small notes to conserve and enhance his estate just

the same as Higgins was in investing and re-investing an estate of over thirty-five million dollars. In this connection Higgins was not permitted to deduct certain expenses as business expenses because such investments were his personal activities and were not incurred in connection with a "trade or business". The same law should apply to Petitioner. The purpose to be accomplished is different but the principle is the same.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that this Petition for a writ of certiorari be granted.

Alexander D. McNabb
Pro Se

CERTIFICATE OF SERVICE

I certify that on this date three copies of the foregoing Petition for writ of certiorari were served on the Solicitor General, Department of Justice, Washington, D. C., 20530, Attention of Kathryn H. Baldwin and Thomas J. Press, and one copy to the Department of Health, Education and Welfare, Washington, D. C., which were sent by Air Mail Postage prepaid, and one copy to Eldon B. Mahon, U. S. District Attorney, Federal Building, Dallas, Texas.

Dated this ____ day of August, 1971.

Alexander D. McNabb

APPENDIX A

Department Of
HEALTH, EDUCATION, AND WELFARE
Social Security Administration
Bureau of Hearings and Appeals

DECISION OF APPEALS COUNCIL

In the case of	Claim for
Alexander McNabb	Old-Age Insurance Benefits
(Claimant)	(Deductions)
Alexander McNabb	457-54-5133
(Wage Earner)	(Social Security Account Number)

This case is before the Appeals Council upon the claimant's request for review of the decision of the hearing examiner issued on July 11, 1969. The Appeals Council granted the request for review and notified the claimant of his rights with respect thereto. The claimant appeared before the Appeals Council for an oral argument of his claim.

In his decision, the hearing examiner found in effect that the claimant's activities of note discounting during 1964, 1965 and 1966 constituted a trade or business and the remuneration derived from it was includable in computing his net earnings from self-employment. He also found to the effect that the claimant derived net earnings of $13,192.93 in 1964 and $5,093.46 in 1965 and net income of $156.06 for 1966. He further found that the claimant rendered substantial services in self-em-

ployment in all months of those years and had excess earnings in 1964 and 1965 in sufficient amounts to preclude the receipt of monthly benefits.

The hearing examiner's references to the pertinent provisions of the Social Security Act and his statement of the evidentiary facts are incorporated herein by reference but are supplemented as shown below. The Appeals Council adopts only the hearing examiner's inferences, findings and conclusions which are set forth in this decision.

Additional evidence has been received by the Appeals Council and admitted into the record. That evidence consists of a statement dated October 20, 1969, by the claimant and is identified as Exhibit AC-1.

The issues to be decided by the Appeals Council are the amounts of the claimant's net earnings from self-employment in each of the years 1964, 1965, and 1966 and whether, and to what extent, deductions are imposable against benefits payable on his earnings record for any months of entitlement in those years.

Section 203(b) of the Social Security Act provides that deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment to which an individual is entitled for a month, and from any payments to which any other persons are entitled on the basis of such individual's wages and self-employment income for such month if for such month the individual is charged with excess earnings.

Section 203(f) of the Act, as applicable for taxable years ending after June 1961 and prior to January 1, 1966, provides that a beneficiary under age 72 may earn $1,200 in a 12-month taxable year without loss of benefits. However, if earnings exceed $1,200, deductions are imposed for the first $500 of earnings in excess of $1,200 at the rate of $1 of benefits for $2 in earnings. If earnings exceed $1,700, deductions are imposed at the rate of $1 for each $1 of such excess earnings. No deductions are imposed against a benefit for any month in which a beneficiary did not earn wages of more than $100 and did not render substantial services in self-employment.

Section 203(f) of the Act, as amended in 1965 and as applicable for the taxable year of 1966, provides that a beneficiary under age 72 may earn $1,500 in a 12-month taxable year and still receive all of his benefits. When earnings exceed $1,500, deductions are imposed for the first $1,200 of earnings in excess of $1,500 at the rate of $1 of benefits for $2 of earnings. If earnings exceed $2,700, deductions are imposed at the rate of $1 for each $1 in earnings over $2,700. No deductions are imposed against a benefit for any month in which a beneficiary did not earn wages of more than $125 and did not render substantial services in self-employment.

Section 203(f) (5) (A) of the Act provides that an individual's earnings for a taxable year shall be the sum of his wages for services rendered in such year and his net earnings from self-employment for such year

minus any net loss from self-employment for such year.

Section 211(a) of the Act and section 1402(a) of the Internal Revenue Code of 1954 provide in part that the term "net earnings from self-employment" means the gross income, as computed under Subtitle A of the Internal Revenue Code of 1954, derived by an individual from any trade or business carried on by him less the deductions allowed under such subtitle which are contributable to such trade or business.

Section 162(a) of the Internal Revenue Code of 1954 provides that there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Section 211(b) of the Act defines the term "self-employment income" as the net earnings from self-employment derived by an individual during a taxable year after 1950 except that such term shall not include such derived earnings if, for the taxable year, they are less than $400.

Section 211(c) of the Act provides, as pertinent herein, that the term "trade or business," when used with reference to self-employment income, shall have the same meaning as when used in section 162 of the Internal Revenue Code of 1954. Section 162 of the Internal Revenue Code does not specifically define "trade or business." However, Section 404.1070(a) of Social Security Administration Regulations No. 4 (20CFR

404.1070(a)) provides that a determination as to whether or not an individual is engaged in an included trade or business will depend upon all of the facts and circumstances in the particular case. The existence of a trade or business may be ascertained by consideration of such factors as whether the activity was initiated and conducted in good faith with the intention of making a profit or producing income, whether the activity has been carried on as a regular occupation for the purpose of a livelihood or a profit, and whether the person held himself out to others as being engaged in the selling of goods or services.

Section 203(f) (4) provides in pertinent part that an individual will be presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business, the net income or loss of which is includible in computing his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

In determining whether an individual's services in self-employment are substantial, Section 404.447 of the regulations (20CFR 404.447) provides that consideration shall first be given to the amount of time in a month devoted to a trade or business. The time devoted to a trade or business includes all time spent by the in-

dividual, whether physical or mental, at his place of business or elsewhere, in furtherance of the trade or business. If the time devoted by an individual to his trade or business is more than 45 hours in a month, it may be found that his services in such month were substantial unless evidence is submitted which establishes that he could reasonably be considered "retired." Where the time is not more than 45 hours a month, it may be found that the services are not substantial in the absence of other factors which would make such a finding unreasonable. Such other factors include the nature and value of such services, their regularity and a comparison of services rendered before and after "retirement."

The record shows that the claimant filed an application for old-age insurance benefits on April 18, 1962. He became entitled to benefits beginning January 1962 but payments were withheld because he was determined to be engaged in a business, with earnings from his self-employment; he was rendering substantial services in the business in all months and his earnings were in excess of the statutory limits under the Social Security Act.

The claimant had been engaged in the same business operation of note-discounting for at least 25 years before filing for monthly benefits. He also was a practicing attorney. The record shows that until 1962 he reported earnings and/or losses from both activities as business income for tax purposes. He differentiated between the income from note-discounting and interest income received from savings accounts and securities

purchased for investment purposes, treating the first as income from business and the other as investment income. Beginning with 1962, he reported only earnings (or losses) from his law practice as business income and included amounts received from his note-discounting activities as part of his investment income. He alleged those amounts were earned not from a trade or business but from investments and, with only a small profit or a loss each year from his work as an attorney, deductions should not be imposed against benefits payable for the years 1964, 1965 and 1966 at issue.

It was the contention of the claimant that the amount of activity and time spent in regard to personal investments and the expense that might be involved in handling them did not indicate the existence of a business. He cited several cases (*Higgins* v. *Comm. of Internal Revenue*, 1941, 312 U. S. 212, 217, 61 SP, CT. 475-478, 85 L.Ed. 783; *Thomas* v. *Oberchain*, 185 F. 2d 455 U.S. Cout of Appeals, 5th Cir. 1950; *Campbell* v. *Walker*, U.S. Cir. Ct. of App. 5th Cir. Dec. 9, 1953, 208 F. 2d. 457-459), as establishing that activities in conserving and enhancing an estate do not constitute carrying on a trade or business regardless of the amount of time, effort or expense involved. However, after a careful review, of the record, the Appeals Council is not convinced that there was any change in claimant's activities pertaining to note discounting in 1964, 1965 and 1966, as compared with previous years. No change was indicated by the evidence in the written record or in the claimant's testimony at his hearing before a hearing examiner or in his appearance before the

Appeals Council. The facts show that he continued to engage in note-discounting with the intention of producing income that he did so on a regular and continuing basis, and that he denied (sic) considerable income therefrom. The activity required his personal services and he held himself out to the public as being engaged in a regular occupation. Accordingly, the Appeals Council is of the opinion, and concurs with the hearing examiner's findings, that the claimant was engaged in a trade or business in the activity to this extent of note-discounting in 1964, 1965, and 1966 and that the income he derived from said activity is includible in computing his net earnings from self-employment.

The claimant indicated that, as a retired attorney, he devoted 8 hours per week to his law practice in 1965. He estimated a monthly total of 17 hours in each of the years 1964 and 1966. In regard to his note activity, he stated he worked more than 15 hours per month in servicing his notes. Consequently, he devoted at least 32 hours per month to his business activities in 1964, 49 hours per month in 1965 and 32 hours monthly in 1966. However, in view of the nature of his activity wherein experience and expertise are of primary importance, the time spent is not a controlling factor.

Section 404.447 of the regulations states that the 45 hour test is not the only criteria for determining substantial services. Some services, because of their personal and skilled nature may be substantial even though the actual time involved is less than 45 hours a month. In

the opinion of the Appeals Council, the services of the claimant were of such nature.

From the time he began note-discounting, the claimant has been the only person involved in the note-discounting activity and it has always been completely under his control and direction. The fact that he was able to produce substantial earnings on a limited work schedule indicates that it was the skilled nature of his services and not the time spent which was the vital factor in his business. Therefore, the Appeals Council concurs with the finding of the hearing examiner that the claimant rendered substantial services in each of the months of 1964, 1965 and 1966.

However, the Appeals Council does not concur in the findings of the hearing examiner to the effect that the claimant derived net earnings of $13,192.93 in 1964; $5,093.46 in 1965 and $156.06 for 1966. On his tax returns for 1964 the claimant reported gross income of $18,506.37 and expenses of $5,313.44 in his note-discounting activity, with a loss of $2,994.98 for his law practice. His gross and expenses in note-discounting in 1965 were $10,807.49 and $5,714.03, respectively. He reported a loss of $2,914.18 from his law practice. The figures for 1966 were a gross of $4,939.89 and expenses of $4,783.83 in note-discounting and a loss of $2,256.69 from law practice. In determining net earnings for any year under the provisions of the Act and the Internal Revenue Code, the income, expenses and losses of all businesses in which the individual is involved must be used. When both the note-discounting business and the law practice of the claimant are considered, the claimant's net earnings are $10,197.95 for 1964 and

$2,179.28 for 1965, with a loss of $2,100.63 for 1966. The Appeals Council so finds.

On the basis of the above finding, the Appeals Council further finds that the claimant had excess earnings of $8747 in 1964 and $729 in 1965, pursuant to section 203(f) of the Act.

It is the decision of the Appeals Council that the claimant was engaged in a trade or business in the activity of note-discounting in 1964, 1965, and 1966; that he had total earnings of $10,197.95 in 1964 and $2,179.28 in 1965 and a loss of $2,100.63 in 1966; that he rendered substantial services as a self-employed person in all months of those years; that he had excess earnings of $8747 in 1964 and $729 in 1965; that deductions are imposable against benefits payable in 1964 and 1965 to the extent that excess earnings are chargeable against benefits payable and that no deductions are imposable against benefits payable in 1966.

The decision of the hearing examiner as modified herein is affirmed.

APPEALS COUNCIL
/s/ John T. Allen
John T. Allen, Member
/s/ Lester Schuker
Lester Schuker, Member
/s/ Charles M. Erisman
Charles M. Erisman, Member
Date: Jan. 12, 1970

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALEXANDER D. McNABB,
Plaintiff,
CIVIL ACTION
versus No. CA-3-3695-A

ELLIOT L. RICHARDSON,
Secretary of Health, Education, and Welfare,
Defendant.

JUDGMENT

The above entitled matter having come on before the Court on the 30th day of December, 1970, upon cross-motions for summary judgment filed by the parties, and the matter having been argued and submitted and the Court being fully advised in the premises,

It is ORDERED, ADJUDGED and DECREED that the defendant's motion for summary judgment be and it is hereby granted, and that the decision of the Secretary of Health, Education and Welfare be and it is hereby affirmed and the plaintiff's complaint be and it hereby is dismissed.

ENTERED this 30th day of December, 1970.

/s/ Joe E. Estes
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1494
Summary Calendar*

ALEXANDER D. McNABB,
Plaintiff-Appellant,

versus

ELLIOT L. RICHARDSON, Secretary of the Department of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(June 25, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

[1]*See NLRB v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F.2d 966.

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No. 71-291

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1971

ALEXANDER D. MCNABB, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-291

ALEXANDER D. MCNABB, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In April 1962, petitioner applied for and was awarded old age insurance benefits effective January 1962. However, on the basis of petitioner's activities in the management of his investment properties, particularly his activities in the purchase of real estate notes at discount, the Secretary determined that petitioner's income therefrom constituted earnings from self-employment and that petitioner was, for the years

in question, continuing to render substantial services to his business. Inasmuch as petitioner received remuneration in excess of $100 per month from his business in 1964 and 1965, the Secretary determined that petitioner's earnings in those years precluded old age insurance benefits for 1964 and required reduction of his benefits for the following year.

After exhausting his administrative remedies, petitioner brought this action in the district court, alleging that his note-discounting activities did not constitute a trade or business from which excess earnings could be applied against old age insurance benefits. The district court granted judgment for the Secretary (Pet. App. 11a), and the court of appeals affirmed (Pet. App. 12a), and denied rehearing (Pet. 2).

This Court has recognized that the determination of "* * * whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." *Higgins* v. *Commissioner of Internal Revenue*, 312 U.S. 212, 217. In the instant case, the Secretary's decision that petitioner's old age insurance benefits were subject to offset because of excess earnings was based on a factual determination of the nature of petitioner's note-discounting activities. Both courts below affirmed the Secretary's decision, holding that it was supported by substantial evidence. The factual question of the nature of petitioner's note-discounting activities has thus been fully resolved adversely to petitioner and does not warrant further review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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